No. 06-628

In the Supreme Court of the United States

Derrick Ramon Dukes,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

Frederick J. Goetz
Counsel of Record
43 Main Street S.E., Suite 400
Minneapolis, MN 55414
(612) 874-1552

Counsel for Petitioner

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REPLY TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

The State of Minnesota, for the first time, raises the issue of procedural default in its brief in opposition. This new point provides no basis to deny the petition for a writ of certiorari as the state has waived this argument and as petitioner has not procedurally defaulted his Sixth Amendment Confrontation Clause claim.

The state did not assert the defense of procedural default when it responded to Dukes' petition for post-conviction relief in the state district court or at the Minnesota Supreme Court. The state waived its procedural default defense by failing to raise it before the Minnesota state courts. See *Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002); *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005).

The state may also not avail itself of this defense as there has been no procedural default of Dukes' claim that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d. 177 (2004); should be applied retroactively. The case comes before the United States Supreme Court upon Dukes' petition for a writ of certiorari from the Minnesota Supreme Court's decision affirming the denial of Dukes' Petition for Post-Conviction Relief under Minnesota Statute § 590.01. See *Dukes v. State*, 718 N.W.2d. 920 (Minn. 2006). Dukes is not procedurally barred from raising a claim of *Crawford* error in a Petition for Post-Conviction Relief under Minnesota Statute § 590.01 where the claim was not available at the time of his direct appeal. *Jihad v State of Minnesota,* 714 N.W.2d 445,448 (Minn. 2006).

The procedural default defense also does not apply here as Dukes did raise his Confrontation Clause claim at his

initial trial and on direct appeal. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); and *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); are both distinguishable. In both cases the respective petitioners failed to raise the claims upon which they sought post-conviction relief on direct appeal. Such failures in each case resulted in this Court's finding procedural default. *Bousley*, 523 U.S. at 621, 118 S.Ct. at 1610; *Murray*, 477 U.S. at 489, 106 S.Ct. at 2646.

In contrast, Dukes raised his Sixth Amendment Confrontation Clause claim at trial *and* in his direct appeal to the Minnesota Supreme Court. *State v. Dukes*, 544 N.W. 2d 13 (Minn. 1996). Dukes therefore did not procedurally default on his Sixth Amendment claim having specifically raised it on direct appeal. *Barnabei v. Angelone*, 214 F.3d. 463, 472 (4th Cir. 2000) (abrogated on other grounds, *Bell v. Jarvis*, 236 F.3d. 149 (4th Cir. 2000).

Finally, the specific claim now raised by the petitioner is that *Crawford v. Washington*, supra, should be applied retroactively. Petitioner could not have procedurally defaulted on this claim as it was not available until 2004, well after his conviction became final.

CONCLUSION

The State of Minnesota can not now avail itself of a procedural default defense where it failed to raise this claim before the Minnesota state courts. Moreover, even if the claim were properly made, Dukes has not procedurally defaulted his claim that *Crawford v. Washington* should be applied retroactively. This claim is properly made in Dukes' petition for post-conviction relief under Minnesota Statute § 590.01. Dukes also raised his Sixth Amendment Confrontation Clause claim on direct appeal and therefore did not procedurally default such claim. The state's reasons for denying Dukes' petition for a writ of certiorari are therefore without merit. Dukes asks that his writ be granted for the reasons stated in his petition.

Dated this 16th day of February, 2007.

Respectfully submitted,

GOETZ & ECKLAND P.A.

By: _____

FREDERICK J. GOETZ (#185425)
Counsel of Record
Exposition Hall at Riverplace
43 Main Street S.E., Suite 400
Minneapolis, MN 55414
(612) 874-1552

Counsel For Petitioner